COMMONWEALTH OF MASSACHUSETTS
OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION

# DEPARTMENT OF TELECOMMUNICATIONS & ENERGY

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## MEMORANDUM AND HEARING OFFICER RULINGS

TO: All Parties to D.T.E. 98-57-Phase III *(via E-mail and Regular Mail*)

FROM: Jesse Reyes, Hearing Officer

RE: Post-hearing Record Request; Reopening of Record and Additional Hearing; AT&T's Motion Pro Hac Vice.

DATE: May 24, 2002

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Because the Department has received comments and information that may be relevant to the remaining issues being investigated in D.T.E. 98-57 Phase III, and that were unavailable when the record was closed after the hearing on November 15, 2001, the Department, on its own motion, is reopening the record to admit new evidence that may be necessary to the final order in this proceeding. The scope of the new evidence to be admitted, however, is limited as discussed below. In the rulings below, I have omitted discussion of the legal arguments that the parties had already made during the regular briefing schedule except where the new information may be relevant to those issues.

## I. INTRODUCTION

On March 7, 2002, Verizon Massachusetts ("Verizon") filed a letter informing the Department of Telecommunications and Energy ("Department") of its recent announcement regarding its "preliminary plans to conduct a first-office application of its Digital Subscriber Line ('DSL') access service using an integrated (i.e. Verizon-provided) DSL line card in at least one location in Massachusetts during the latter half of 2002." Verizon described the service as "a wholesale end-to-end packet data service between a Network Interface Device (NID) at an end user location and a data carrier's Point of Termination (POT) in the end user's serving central office (CO)." (Verizon Letter (Mar. 7, 2002), att. 1 at 1). Verizon further stated that "[t]he interface at the CO will be OC-3 or DS-3 provided by a Verizon Optical Concentration Device (OCD)." (Id.) Verizon offers to provide CLECs with at least 90 days advance notice before commercial availability of the service whenever Verizon makes a final decision to deploy service at a remote terminal. (Id. at 2).

The hearing officers requested further comments from the parties on the effect of this new information on the remaining issues under review in D.T.E. 98-57 Phase III. Verizon, Covad Communications Company ("Covad"), and AT&T Communications of New England ("AT&T") filed separate comments on April 9, 2002. The hearing officers then granted leave for all parties to file a response to the comments. Covad filed its response on April 24, 2002, and AT&T and Verizon filed their responses on April 25, 2002. AT&T also filed a motion for admission of additional counsel pro hac vice along with its response.

## II. PARTY COMMENTS

### A. Verizon

Verizon further describes the planned packet switching offering as a "PARTS-like offering [that] will utilize Asymmetrical DSL ("ADSL") technology with an integrated, Verizon-provided DSL line card, not CLEC-provided line cards at the [remote terminal ("RT")]." (Verizon Reply Comments at 1). Verizon states that on February 20, 2002, it notified CLECs by electronic mail that it had decided to proceed with a first-office application of this offering in Massachusetts. (Id. at 5). Verizon states that it has made available to CLECs on an ongoing basis "additional administrative, technical, operational and other network and process-related information associated with the introduction of this service." (Id.).

Verizon now argues, however, that the Department need not take any further action, asserting that the Federal Communications Commission ("FCC") "has long held that in the packet-switched environment of the Internet, traffic is predominantly 'interstate' for jurisdictional purposes."[1] Verizon further asserts that the FCC has held that ADSL services should be tariffed at the federal level, and that the FCC is currently reviewing incumbents' obligations to make facilities available as unbundled network elements.[2] Thus, Verizon argues

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[1] Verizon Comments at 2 and n.1, citing In the Matter of Implementation of the Local Competition Provisions in the Telecommunication Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 96-98 & 99-68, FCC 01-131, Order on Remand and Report and Order, ¶¶ 14, 58-59 (rel. Apr. 27, 2001).

[2] Verizon Comments at 2 and n.3, citing In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities and Universal Service Obligations of Broadband Providers, CC Docket No. 02-33, and Computer III Further Remand Proceedings, CC Docket Nos. 95-20, 98-10, FCC 02-42, Notice of Proposed Rulemaking, ¶¶ 17, 24-27 (rel. Feb. 15, 2002); Review of Section 251 Unbundling

(continued…)

that it is not required to file an intrastate tariff in order to offer DSL services at the RT in Massachusetts. (Verizon Comments at 3). Therefore, Verizon states that it intends to file a federal tariff prior to implementing the service offering, and simply provide the Department and other carriers "with appropriate notification on its future plans. (Id.).

B. Covad

Covad argues that because Verizon repeatedly "denied until recently that it had specific plans to deploy PARTS on a retail or wholesale basis," the Department should investigate exactly when Verizon began planning this service (Covad Comments at 2). Covad claims that contrary to Verizon's earlier positions, Verizon should now be able to negotiate operational issues with CLECs because the first office application of the PARTS-like service is only three months away.[3] (Id. at 3). Covad also argues that the 90-day advance notice of deployment of packet switching at additional remote terminals does not provide sufficient time for CLECs to offer retail services and to resolve operational problems. (Id. at 4).

Finally, Covad disagrees with Verizon's argument that the Department does not have jurisdiction over packet switching facilities and that the service need only be tariffed with the FCC. (Covad Reply Comments at 1). Covad argues that "Verizon's argument that its retail PARTS service should be tariffed as a federal service ignores its wholesale obligations based on TELRIC principles" and that state commissions pay a role in implementing and enforcing UNE rules (Id. at 1 n.2, citing Telecommunications Act of 1996, § 251(d)(3)).

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[2] (…continued)
Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Notice of Proposed Rulemaking, FCC 01-361, 16 FCC Rcd. 22781 (rel. Dec. 20, 2001) ("Triennial UNE Review Notice").

[3] Covad urges the Department to set ground rules on CLEC access to PARTS equipment, including (1) requiring Verizon to provide information pertaining to the four-part test in 47 C.F.R. 51.319(c)(5) before offering retail DSL services based upon PARTS, (2) providing procedures for CLEC participation in Verizon's planning process to deploy PARTS equipment, and (3) providing procedures for CLECs to order packet switching in commercially-viable quantities. (Covad Comments at 2-3). While this essentially repeats Covad's previous arguments made early in this proceeding, I note these points again because the new evidence may affect the Department's findings on these issues.

C. AT&T

AT&T argues that Verizon's March 7, 2002 filing is "cryptic" and attempts to avoid connection with the illustrative PARTS tariff, the details of which the parties had litigated earlier in this proceeding. (AT&T Comments at 6). AT&T argues that the Department will need additional information regarding the technology, terms and conditions, and scope of the planned development in order to determine whether the conditions for requiring Verizon to provide DSL over fiber on an unbundled basis are satisfied or whether Verizon must provide DSL over fiber on an unbundled basis even if the conditions are not satisfied. (Id. at 1, 6-7; AT&T Reply Comments at 4-5, citing 47 C.F.R. § 51.319(c)(3), (c)(5)). Therefore, AT&T argues that Verizon must provide the details and full scope of its planned deployment of the offering described in its March 7, 2002 filing, specifying the locations of planned development. (AT&T Comments at 8-9; AT&T Reply Comments at 16). AT&T also argues that the Department should review a number of operational issues raised in discovery that are related to the illustrative tariff but were unresolved.[4] (AT&T Comments at 9, citing CVD-VZ-2-2 through 2-5 and CVD-VZ 2-8). In addition, AT&T seeks the opportunity to discover information including

> technical details and limitations of the equipment Verizon expects to use, similarities and differences between Verizon's proposed offering and Project Pronto, the extent of Verizon's planned deployment, the locations of planned deployment, the factors that affect the decision regarding which locations are suitable, and the availability of alternatives to reach end-users presently served by hybrid copper/fiber loops.

(Id. at 11).

As Covad argues, AT&T also contends that Verizon's plan to file a federal tariff for a wholesale end-to-end DSL service does not preclude the Department from reviewing this issue. (AT&T Reply Comments at 12). Moreover, AT&T argues that the Department has independent authority under state law to require Verizon to provide DSL-capable fiber-fed loops as a UNE. (Id. at 12-13).

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[4] A number of the identified operational issues are related to the "Plug and Play" option in the illustrative tariff. Although it appears from Verizon's filings that Verizon proposes to offer a PARTS-like service without plug-and-play, I will permit the parties to discover any new facts arising out of Verizon's new deployment plans that will affect these discovery responses.

III. Standard of Review

The Department's procedural rule on reopening hearings, 220 C.M.R. § 1.11(8), states, in pertinent part, "[n]o person may present additional evidence after having rested nor may any hearing be reopened after having been closed, except upon motion and showing of good cause."[5] Good cause for purposes of reopening hearings has been defined as a showing that the proponent has previously unknown or undisclosed information regarding a material issue that would be likely to have a significant impact on the decision. Machise v. New England Telephone and Telegraph Company, D.P.U. 87-AD-12-B at 4-7 (1990); Boston Gas Company, D.P.U. 88-67 (Phase II) at 7 (1989); Tennessee Gas Pipeline Company, D.P.U. 85-207-A at 11-12 (1986).

IV. Rulings

At the time of the hearing in this proceeding, held on November 15, 2001, Verizon had indicated that it did not then have plans to offer PARTS and that it had not yet completed the necessary steps such as OSS-development and equipment deployment. Verizon's March 7, 2002 filing and subsequent comments, however, indicate that Verizon now intends to deploy in Massachusetts a "PARTS-like" end-to-end packet data service by the latter half of the year 2002. Although Verizon's announcement does not address the details over which the parties litigated in this proceeding, it is clear that material facts pertaining to Verizon's ability to offer PARTS or a PARTS-like service have changed and should be entered into the record. Therefore, I find good cause to reopen the record and to hold a further evidentiary hearing.

In reopening the record, I am limiting the scope of the additional hearing only to review any previously identified issues where underlying facts have changed since the November 15, 2001 hearing, as well as any new facts arising as a result of Verizon's announcement and actions that Verizon has taken in order to prepare to offer the proposed service. The parties are not to relitigate facts already in the record.[6] I will allow the parties to issue discovery immediately on a rolling basis according to the attached procedural schedule, with the proposed hearing date. Because the scope of this hearing is limited, I do not foresee any need for further briefing. Instead, I propose to hear oral arguments at the close of the

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[5] The rule further provides that "the Department may, at any time prior to the rendering of a decision, reopen the hearing on its own motion."

[6] The issues that Covad and AT&T have identified, as outlined above, are generally within the scope of the reopened hearing. If, however, any fact responsive to a discovery request has not changed since November 15, 2001, I direct the responding party to identify those facts and provide citation to the existing record.

evidentiary hearing in order to expedite the Department's review. If the parties require the opportunity to brief the Department on the new evidence presented, I will entertain such a motion at the close of the evidentiary hearing.

I am not ruling upon the merits of Verizon's new argument that it need only file a tariff with the FCC and that the Department need not take any further action. Verizon's filings regarding the proposed service do not provide sufficient information about that service for the Department to decide the issue. The Department will decide that issue in the final order in this proceeding. Until the Department makes such a determination, the parties should proceed under the operating assumption that the Department is still investigating whether Verizon can be ordered to provide unbundled packet switching, whether plug and play is feasible, and whether Verizon's tariff should include the terms of PARTS or a PARTS-like tariff. D.T.E. 98-57 Phase III, at 88-89 (Sept. 29, 2000); D.T.E. 98-57 Phase III-A, at 44-45 (Jan. 8, 2001).

## V. AT&T Motion Pro Hac Vice

AT&T file a motion pro hac vice to admit Cynthia T. McCoy to represent AT&T in this proceeding. AT&T states that Attorney McCoy is one of its regular counsel in regulatory matters, that her admission pro hac vice is necessary to AT&T's efficient representation in this proceeding, and that she otherwise meets the Department's standards for admission pro hac vice. The motion is granted.

VI. Procedural Schedule - D.T.E. 98-57 Phase III

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| Discovery reopens on a rolling basis<br>(Discovery responses due seven days after receipt) | May 24, 2002 |
| Deadline for filing discovery requests | June 14, 2002 |
| Proposed exhibit list & pre-filed testimony due | June 21, 2002 |
| Evidentiary hearing | June 28, 2002 |

Under the provisions of 220 C.M.R. § 1.06(6)(d)(3), any party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation within five (5) days of this Ruling. Any appeal must include a copy of this Ruling.

Please remove Paula Foley from your service list in D.T.E. 98-57 Phase III. If you have any questions, please contact Jesse Reyes (617) 305-3735.

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Jesse S. Reyes, Date
Hearing Officer